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2001-014-862

June 28, 2001

Ms. Laurie Duarte
General Services Administration
FAR Secretariat (MVP)
1800 F Street, NW
Room 4035
Washington, DC 20405

RE: **FAR Case 1999-010 (Stay) and FAR Case 2001-014**

Dear Ms. Duarte:

On behalf of the Copper and Brass Fabricator's Council, Inc. ("CBFC"), set forth below are comments in support of the Federal Acquisition Regulations Council's (FAR Council) stay and proposed revocation of the final rule addressing contractor responsibility published in the December 20, 2000 Federal Register at 65 Fed. Reg. 80255. (Hereafter "final rule"). The Notice to stay this final rule was published in the April 3, 2001 Federal Register at 66 Fed. Reg. 17754, and the proposal to revoke was published in the April 3, 2001 Federal Register at 66 Fed. Reg. 17758. On November 8, 1999 the CBFC timely filed comments in opposition to the original proposed rule amending Federal Acquisition Regulation (FAR), 48 C.F.R. parts 9 and 31, as published in 64 Fed. Reg. 37358-37361 (July 9, 1999). The November 8, 1999, CBFC comments remain relevant to the FAR Council's proposal to revoke the final rule and are hereby incorporated by reference into the present submittal. On August 28, 2000, the CBFC timely filed additional comments in opposition to a revised proposal to amend Federal Acquisition Regulation (FAR), 48 C.F.R. parts 9, 14, 15, 31 and 52, as published at 65 Fed. Reg. 40829-40834 (June 30, 2000). The August 28, 2000, CBFC comments also remain relevant to the FAR Council's present proposal and are hereby incorporated by reference into the present submittal.

The Copper and Brass Fabricators Council ("CBFC") is a trade association that represents the principal copper and brass mills in the United States. The 21 member companies (see attached appendix A for a list of member companies) together account for the fabrication of more than 80% of all copper and brass mill products produced in the United States, including sheet, strip, plate, foil, bar, rod, and both plumbing and commercial tube.[1] These products are used in a wide variety of applications, chiefly in the automotive, construction, and electrical/electronic industries. The Federal Government directly purchases brass mill products for such uses as production of coinage, and munitions for the military. In addition, these products are supplied indirectly to the Federal Government through products assembled or

[1] Because "brass"(a copper-based alloy containing zinc) accounts for a major part of the total production of the industry, it has come to be know as the "brass mill industry," which should be understood to include non-alloyed copper mill products such as pure copper plumbing tube and flat-rolled copper sheet.

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installed by brass mill customers, such as information-technology hardware, air-conditioning equipment and installations, plumbing in residential and commercial buildings, and automobiles. Many CBFC member companies qualify as small businesses (750 employees or less) under the definitions of the Small Business Administration, classified within the 1997 North American Industrial Classification System code 331421, "Copper rolling, drawing, and extruding."

The CBFC supports the FAR Council's stay of the final rule as published in the Federal Register notice of April 3, 2001. The final rule was published in the December 20, 2000, Federal Register and became effective on January 19, 2001. Even if the final rule were workable, which it is not, the thirty days from publication to effective date is woefully inadequate for government contractors and federal Contracting Officers (CO's) to prepare for and implement the burdensome requirements of the rule. That said, it must be further stated that no amount of time would be adequate to implement the unrealistic and burdensome requirements of the final rule. Therefore, the CBFC further supports the FAR Council's proposal to revoke the final rule.

For the reasons outlined in our earlier comments, the contractor responsibility rule as originally proposed, and as revised, improperly and unjustly expands the bases for which a company can be deemed ineligible for award of a government contract. The final rule published on December 20, 2000, did nothing to alleviate the many problems posed by the earlier versions. There is no justification for expanding the CO's responsibility to include the added categories of laws and the requirement that contractors certify compliance with the entire universe of federal, state, local and foreign laws and regulations. The rule does not provide sufficient guidelines to CO's to prevent arbitrary and otherwise abusive implementation. The costs and other significant non-monetary burdens of implementing the rule will greatly outweigh the benefits. As a basis for these conclusions, we rely on arguments presented in our November 8, 1999, and August 28, 2000, comments located in the docket for the final rule, as well as the following additional comments:

1) **Burden on Contracting Officers:** The final rule still requires CO's to make legal interpretations of technical provisions of complex laws for which they are not trained or equipped. Compared to the original proposal, this problem was aggravated in the final rule by including "foreign laws" as an additional category for which CO's must evaluate contractor compliance. The final rule fails to provide the CO with sufficient guidelines or training to prevent arbitrary or otherwise abusive implementation. In addition, the breadth and complexity of laws and lack of CO expertise and training will result in inconsistent decisions throughout the system. There is no remedy for this deficiency in the final rule. The complexity and volume of the laws and regulations thrust upon the CO make it impossible for even the most capable to become sufficiently knowledgeable to avoid this arbitrariness and inconsistency, even if the FAR Council attempts to set up a training system. The Code of Federal Regulations for employment law alone covers 4000 pages of fine print. The universe of laws and regulations is literally too expansive and complex for a central authority to enforce. The enforcement of the laws should be left to the debarment process and the agencies charged with administering the various laws.

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2) **Adds New Penalties Congress Did Not Intend:** The final rule usurps Congressional authority by including denial of contracting rights to the penalties of scores of laws which Congress could have, but did not, include as a penalty. The final rule constitutes de facto amendment of the remedial and penalty provisions of scores of laws, including specifically those enumerated in the final rule.

3) **No Nexus to Contract Performance:** The final rule fails to establish any 'nexus' between past violations or complaints alleging violations of labor and employment laws and a prospective contractor's present ability to perform a contract, the common theme throughout existing procurement regulations. The existing general standards for a finding of responsibility all relate to the performance of the contract. The final rule, on the other hand, forces the CO to become the enforcer of the entire universe of laws and regulations to which potential government contractors are subject. This is an unreasonable and inappropriate use of the procurement system.

4) **Single Complaint May Be Basis for Disqualification:** Under the final rule, prospective contractors can still be "blacklisted" based on allegations and complaints that have not been fully adjudicated, and on unsubstantiated information supplied by outside parties to the contracting officer. The final rule requires the CO to give the greatest weight to offenses adjudicated in the last three years, an improvement over the rule as originally proposed. However, it still requires the CO to consider "all relevant credible information" in making the responsibility determination, thus subjecting the government contractor to loss of contracting rights based on mere allegations of violations that have no basis in fact. This subjects the contractor to possible disqualification based on unsupported complaints filed by disgruntled employees, business competitors, rebuffed union organizers, union contract negotiators, or any entity seeking leverage with the contractor or a negative impact on the contractor. Proponents argue that the rule would only disqualify contractors who repeatedly violate the laws in a pervasive and significant way. However, the CO must consider "all credible and relevant information", and there is no requirement that the CO find that the contractor is a repeat offender. By contrast, the existing debarment process contains procedures that protect the contractor from spurious and unsupported accusations. The debarment process should not be replaced by a system that circumvents the safeguards that are contained in the debarment procedures. As the United States Environmental Protection Agency's Office of Acquisition Management noted in their August 28, 2000, comments opposing the rule: "The proposed rule is duplicative of the existing debarment remedy and less efficient in application."

5) **No Due Process for Disqualified Contractors:** Under the final rule, the "blacklisted" contractor is denied due process. There is no opportunity to challenge false information that may have been provided to the CO and used as the basis for non-responsibility determinations prior to the CO making the determination. Supporters of the rule respond that the disqualified contractor can file suit in federal court or file an after-the-fact bid protest. Under this remedy, the disqualified contractor would receive relief, if any, only after another party is awarded the

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contract. This would be no relief at all, and does not constitute due process, which requires notice and an opportunity to be heard while a remedy still exists. Under the proposed rule, a contractor could be disqualified on the basis of unsubstantiated allegations without any opportunity to answer the allegations. The existing debarment procedures, which would remain in place if the FAR Council revokes the final rule, are sufficient to protect the government from contractors who repeatedly violate the enumerated federal laws, and at the same time provide safeguards for government contractors against unwarranted loss of contracting opportunities.

6) **Overly Burdensome Certification:** The final rule retains the certification requirement that places an unmanageable and undue burden on prospective contractors. The contractor must certify the contractor's compliance with all federal, state and foreign labor, employment, tax, environmental, antitrust, and consumer protection laws and regulations over the previous three-year period. For a potential contractor with multiple facilities, the impracticality and high cost of designing, installing and maintaining an integrated system to account for legal violations or alleged violations is prohibitive. Given the risk of civil and criminal sanctions for an honest error in certification under the False Claims Act, many potential contractors will simply decide not to participate in the federal procurement process.

Although the final rule purports to merely clarify disqualifications concerning contractor responsibility considerations, in reality the revised rule changes would greatly expand, without proper legislative authority, the bases for these disqualifications. The rule fails in it's only stated intention to "...clarify the longstanding requirement that federal contractors have a 'satisfactory record of integrity and business ethics.'" 65 Fed. Reg. 40831.

The Federal procurement process has a well-established set of existing rules to ensure that government contracts are granted only to responsible contractors. The final rule contains in its preamble no allegations that the existing suspension and debarment processes are incapable of denying access to government contracts by law-breaking contractors.

In summary, the final rule should be revoked for the same reasons that it should never have been promulgated in the first place. For the reasons summarized above, and more fully discussed in our previously filed comments, the CBFC urges the FAR Council to revoke the final rule on Contractor Responsibility.

Sincerely,

John E. Arnett
Government Affairs Counsel

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Attachment